IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Aaron Clark
and John Peirano, :

Plaintiff : Civil Action 2:08-cv-00982

v. : Judge Holschuh

: Magistrate Judge Abel

The Walt Disney Co.,
JAKKS Pacific, Inc., :
Play Along Toys,
KB Toys, :
Amazon.com, and
Toys "R" Us, :

Defendant :

Discovery Conference Order

On September 16, 2009, counsel for the parties participated in a discovery dispute conference with the Magistrate Judge. Plaintiffs seek discovery from The Walt Disney Company ("TWDC") pursuant to Judge Holschuh's July 9, 2009 Order (doc. 52) permitting plaintiffs "to conduct limited discovery on the issue of personal jurisdiction" over TWDC. Before the discovery dispute conference, counsel provided me with Sharlene L. Chance's September 14, 2009 letter to me with exhibits of the communications between counsel and TWDC's responses to plaintiffs' discovery requests and Grant Kinsell's September 15, 2009 letter to me.

Plaintiffs' discovery requests. Plaintiff served interrogatories and document requests on TWDC seeking such information as all infringing posters offered for sale and sold by it or its subsidiaries and/or Business Segments, the identity of all persons employed by TWDC, its subsidiaries and/or Business Segments who packaged, printed, labeled and/or shipped the allegedly infringing posters, and the like employees who were responsible for marketing the posters.

Defendant TWDC responded that it has never sold any of the allegedly infringing posters; Disney Shopping, Inc. ("DSI") is the only Disney entity that sold the posters. DSI, a corporation, asserts that it is a separate legal entity. TWDC argues that the actions of DSI in Ohio are simply not relevant to whether TWDC is subject to personal jurisdiction here.

Plaintiffs responded that as the parent TWDC has control over documents in possession of its subsidiary DSI and should produce them. But the documents sought are about DSI's activities in and affecting Ohio. Those documents are relevant only if DSI's actions are those of TWDC. Plaintiffs' discovery requests assume that TWDC has such a close relationship with DSI that DSI's actions are those of TWDC. Plaintiffs have offered no evidence that proves that assertion. The discovery permitted by Judge Holschuh's order was limited to TWDC's contacts with Ohio. DSI's contacts with Ohio are relevant only if DSI's actions are those of TWDC. Given that plaintiffs assert that DSI is TWDC's alter ego, they have the right to conduct discovery of facts relevant to determining the alter ego issue, but not the right to discovery about DSI's activities in Ohio unless and until they demonstrate that DSI is TWDC's alter ego.

In *Bradford Company v. AFCO Manufacturing, et al.*, 560 F.Supp.2d 612, 632-33 (S.D. Ohio 2008), Judge Beckwith discussed the factors relevant to determining whether an alter ego relationship exists:

> Neither party has cited any cases from the Federal Circuit that address

> the factors to be considered in determining whether an alter ego relationship exists. Plaintiff has cited cases, however, that examine the alter ego relationship in a jurisdictional context and which set forth the following factors to which courts generally look in making this determination: (1) whether one corporation owns all or most of the stock of the related corporation; (2) whether the corporations share common officers and directors; (3) whether they project a common marketing image; (4) whether they use a common trademark or logo; (5) whether they share employees; (6) whether they have an integrated sales system; (7) whether there is an interchange of managerial and supervisory personnel; (8) whether the related corporation performs business functions which the principal corporation would normally conduct through its own agents or departments; (9) whether the related corporation acts as a marketing arm or exclusive distributor of the principal corporation; (10) whether the officers of the related corporation receive instructions from the principal corporation; (11) whether the parent finances the subsidiary, (12) whether the parent caused the incorporation of the subsidiary, (13) whether the subsidiary is grossly under-capitalized, (14) whether the parent pays the salaries or expenses of the subsidiary, (15) whether the subsidiary has no business or assets apart from the parent, (16) whether there has been a failure to adhere to the formal legal requirements of the subsidiary, (17) whether there is a confusion of distinction between the parent and subsidiary, and (18) whether the subsidiary lacks a full board of directors. *Cali v. East Coast Aviation Servs., Ltd.,* 178 F.Supp.2d 276, 286 (E.D.N.Y.2001) (*citing Superior Coal*, 83 F.R.D. at 421); *Savin Corp. v. Heritage Copy Products, Inc.*, 661 F.Supp. 463, 469 (M.D.Pa.1987). Other factors to which courts have looked include: (1) the existence of separate headquarters for each entity, (2) the observance of corporate formalities, (3) the maintenance of separate accounting systems, (4) the parent corporation's exercise of complete authority over the general policy of the subsidiary, and (5) the subsidiary's exercise of complete authority over its own daily operations. *Seitz v. Envirotech Systems Worldwide Inc.*, 513 F.Supp.2d 855, 865 (S.D.Tex.2007) (*citing Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1160 (5th Cir.1983)).

Having reviewed the written discovery requests, TWDC's responses to them, and having heard the arguments of counsel, I determine that the discovery requests–as served on TWDC–are not carefully tailored to collect facts relevant to determining whether there is an alter ego relationship between TWDC and DSI. Accordingly, I determine that TWDC's responses to plaintiffs' written discovery requests are adequate.

Is TWDC a necessary party? During the discovery dispute conference TWDC's counsel stated that they had previously informed plaintiffs' counsel of TWDC's willingness to stipulate to a dismissal without prejudice. Further, TWDC counsel said during the conference that his client was willing to stipulate that TWDC would be bound by any judgment entered against DSI by this Court. After the dismissal, TWDC is willing to make available for deposition its employees with knowledge of material disputed fact issues in the lawsuit.

TWDC is concerned about the expense of this litigation. It believes that plaintiffs have caused it much unnecessary expense given its view that there is no personal jurisdiction over TWDC in Ohio and the information supporting that position it has provided to plaintiffs' counsel.

s/Mark R. Abel
United States Magistrate Judge